UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, ET AL.,

Debtors.

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United States Bankruptcy Court

One Bowling Green

New York, New York

October 30, 2014

2:03 PM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

**(CC: Doc #6763) Status Conference Regarding Macks' Proof of Claim**

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P R O C E E D I N G S

THE COURT: Okay. All right. We're on the record in Residential Capital, number 12-12020. This is status conference with respect to the Macks' proof of claim.

Can I have the appearances?

MR. GARBER: Your Honor, David Garber on behalf of Barry Mack.

MR. LEWIS: Adam Lewis of Morrison & Foerster for the ResCap Borrower Claims Trust.

THE COURT: I was operating under the assumption that we were on the phone today. My -- so we do have somebody on the phone, right?

COURTCALL OPERATOR: Yes, Your Honor.

THE COURT: Yes, go ahead. Who's on the phone?

COURTCALL OPERATOR: Yes, this is the CourtCall operator. We have two attorneys on the line. They are listen only. Would you like me to open their lines?

THE COURT: If they're listen only, that's fine. I see them on the list. Okay.

COURTCALL OPERATOR: Okay.

THE COURT: Thank you.

Mr. Lewis, where are we?

MR. LEWIS: When we last talked, it was at the discussion we had about discovery.

THE COURT: Right. I know you -- it was the issue

about getting the medical records --

MR. LEWIS: Yeah. And that --

THE COURT: -- and the cost of getting the medical records. You shortened the amount of time in which you were seeking records.

MR. LEWIS: And in the last week or so, I've gotten a substantial additional delivery of various records. Some of the records have provided me with some very important information. I think I told the Court -- because the Court had inquired about settlement then, too --

THE COURT: Yes.

MR. LEWIS: -- and I think we were both of the view that we didn't quite know enough to make a settlement or a mediation discussion rational; I'm very close to being at that point. I've obtained a lot of information that I think is quite useful from the medical records and from other sources, for example, from the litigation. I've dug into the litigation in Florida to obtain some of the records from that.

I think there are two obstacles to proceeding to mediation at this moment. The first is what I've just described. I think I need some more information, but I'm close on that.

THE COURT: What is it you think you need?

MR. LEWIS: Well, I don't yet have medical records for Mrs. Mack's overdose. And I need to see --

THE COURT: Yeah, that's important.

MR. LEWIS: -- compare that with what preceded it, because what preceded it -- her medical condition that preceded it is startling, to say the least. And I want to see what the change was, if any, really.

The other thing I may need to do is take a deposition or two. One of the major witnesses, I believe, for the Macks is a Dr. Lichi (ph.), who was her psychiatrist, and his notes are very interesting.

THE COURT: How long had she been under his care?

MR. LEWIS: She was under his care since -- from about 2005 to about 2010. And his notes are very, very interesting. But I can't read them all, so one of the things I have to do -- I'm the son of a doctor who had horrible handwriting, and I think thought I could read anything, but he's outdone me.

The second thing, I think is -- I believe -- and Mr. Garber can speak for himself on this point -- I believe we have very different views of the scope of this case, as contrasted with the merits. I don't think we can really compare our views of the merits until we have a better understanding of the scope of the case. It's my impression -- and it's just my impression, but I have some reasons for it -- that Mr. Garber is essentially contemplating the Deutsche Bank case and throwing in a 2605(e) claim.

The discovery he's asked for has a lot to do with

stuff that -- you remember the QWR, if it is one, went out on 10/26 of '09. Mr. Garber has asked for all kinds of information that preceded that. I don't see how it's relevant really to what the consequences of where -- of GMACM's failure to respond to that 10/26 letter. I just don't think that's relevant, and I can read the Court some excerpts from discovery that was served on us that I think would illustrate the point.

And so my understanding of the case is, what we're talking about here, the failure to respond to the QWR, which wasn't due until December 26th of 2009, and its consequences as contrasted with the consequences of the wrongful foreclosure and other illnesses or -- that she had or that she had to some degree already at the time. and until we understand the scope of the case, whether it's as narrow as I believe it is or as broad as I think Mr. Garber thinks it is, it's going to be very hard to have meaningful settlement discussions.

THE COURT: Let me ask a couple of questions.

MR. LEWIS: Yes.

THE COURT: Are you providing Mr. Garber the discovery for the pre-QWR period or what are -- I mean, I'm not in -- we're not retrying the Deutsche Bank case. Let me make that crystal clear. We're not retrying the Deutsche Bank case. You recovered against Deutsche Bank, and res judicata applies to claims that were or could have been asserted against Deutsche Bank.

Based on my opinion, what survived was the RESPA claim. And I found that noneconomic damages are potentially recoverable on a RESPA claim. I'll deal with any issues if, as, and when they arise. But based on rulings in other ResCap matters, you should have no belief that I would permit an amendment to the claim to assert other new theories against the Trust. What remains is the RESPA claim.

With that said, Mr. Lewis, the standard for the permissible scope for discovery and what is admissible at trial could be very different. So I'm not precluding Mr. Garber nor did I hear you say you were preventing Mr. Garber from getting discovery about the pre-QWR period. Whether he can link it up and somehow establish why it's admissible, I'm not getting to now.

MR. LEWIS: Well, Your Honor -- so let me tell you what I have responded to and how I've responded and what I have yet to respond to, because it's not due yet but will be shortly. I believe, as my objections explain, that Mr. Garber's document requests -- he sent two sets. One had to do with punitive damages, and I declined to answer any of those because they're not available in RESPA claims, period. And this Court has also said that they're not available in this case, at least twice that I know of.

I also thought his document requests on substantive matters were overbroad in terms of time. Nevertheless,

although making the objections to preserve them and other some other objections to preserve them, I produced essentially everything we had, our file, just to avoid a dust-up.

THE COURT: Um-hum.

MR. LEWIS: But let me read you a couple of these interrogatories that I have yet to respond to because a response is not due yet. "What is the name, title of the employer and address of the employee of GMACM who" --

THE COURT: Just a little louder and slower.

MR. LEWIS: I'm sorry, Your Honor.

"What is the name, title, employer and address of the employee of GMACM who first decided to initiate the foreclosure against the Macks?" There's more like that.

Then, there's another one, for example, "Since January 1st of 2006" -- which is even before the wrongful foreclosure began in 2009 -- "has GMACM initiated foreclosure actions against any borrowers for which they were the owner of the notes and mortgages or servicers, which actions were without basis?" I don't see how that's relevant to this case even marginally. And there's more like that. And there's really two things at issue as a consequence.

One is, obviously, I don't want to go through the cost of responding to these things. And the second is I think it bespeaks an expanded view of the case that Mr. Garber has that will affect how he sees his merits in the mediation. And I'm

afraid a mediation will be futile because we will be so far apart on the merits because of our differences on the scope.

Now, if the Court wants us to mediate under those circumstances, I will do that. but I think if you want to have this case settled, which I certainly do, it's going to cost more to litigate this case than I think we will have to pay out in a judgment someday. But if the Court wants us to do that, we'll do it, although I think, as a consequence of the parties' differing view of the scope, if I'm correctly characterizing Mr. Garber's views, it'll be a nonevent.

THE COURT: All right. Let me hear from Mr. Garber.

And I -- Mr. Garber, let me say -- did I tell you last time that I wanted you both physically present in court?

MR. GARBER: No, Your Honor. You said we could appear by telephone.

THE COURT: I -- okay. I just wanted to be sure that I was not the cause for Mr. Lewis to come from San Francisco --

MR. LEWIS: No.

THE COURT: -- and you to come from Florida.

MR. LEWIS: Mr. Garber --

THE COURT: I'm happy that the two of you are together.

MR. LEWIS: Mr. Garber wanted to be here in person, so I couldn't afford to miss the opportunity.

THE COURT: That's fine. Okay. I just -- I -- if --

I really do try to go out of my way to make sure, particularly -- other than an evidentiary hearing, where counsel is from out of town, is to accommodate -- I'm always happy to have you here, so don't misunderstand me. But I just don't people unnecessarily having to travel. It's better when I see you and hear you, but -- okay. But let's put that aside.

Go ahead, Mr. Garber.

MR. LEWIS: Thank you, Your Honor.

Your Honor, with all due respect, I disagree with Mr. Lewis' characterization of our discovery request. RESPA -- it's my understanding that this claim is confined to a RESPA claim. And RESPA provides for two types of damages. It provides, number one, actual damages, which are not clearly defined, but we've already argued over that. And the other one, it provides for -- I would characterize them -- as punitive damages.

THE COURT: I wouldn't characterize them as that, but --

MR. GARBER: And the way that the language in RESPA handles it is that says in addition to actual damages, should it be found that the conduct that is now complained against is repetitive or endemic, then the Court shall allow an additional 1,000 dollars to that. So --

THE COURT: Mr. Lewis will give you -- right now, he'll agree to pay the extra 1,000 dollars, okay? I mean, it

just --

MR. GARBER: That's true. It's a small amount, but the plaintiff has the burden of proving that they're entitled to that.

THE COURT: He'll give you the extra 1,000 dollars.

MR. GARBER: If he'll do that today, then I can tailor my interrogatories to --

THE COURT: Mr. Lewis --

MR. GARBER: -- cut that.

THE COURT: -- you're not really fussing about 1,000 dollars, no?

MR. LEWIS: No, Your Honor. But I --

THE COURT: It cost more for you -- the two of you to fly here than --

MR. LEWIS: I have to say that that RESPA claim does not appear, not only in the original proof of claim but in anything else. I consider that an attempt to amend the claim when the time to amending the claim has passed. But --

THE COURT: Look, you're not fighting about --

MR. LEWIS: -- that's not going to get in the way of this case.

THE COURT: -- you're not fighting about 1,000 dollars.

MR. LEWIS: No.

THE COURT: Just -- you know?

MR. GARBER: Okay. So the reason that we have asked for some information prior to the foreclosure is to establish the pattern of conduct, and that's all. We're not going to retry the Deutsche Bank case, and I'm not trying to do that. And I'm sorry if he took the discovery as related to that. I didn't mean that.

THE COURT: Okay.

MR. GARBER: Your Honor, the other point that he has --

THE COURT: Mr. Garber --

MR. GARBER: Yes, Your Honor.

THE COURT: -- I am not going to permit discovery about other instances when GMAC or Homecomings or one of the other debtors that serviced loans engaged in what you may consider to be wrongful foreclosure or things of that nature. This case is going to be tried about the Macks and their -- the handling of their loan and not how any of the debtors handled anybody else's loans. You can read some of my recent opinions that have, in one case, after trial upheld -- allowed a claim under the New Jersey Consumer Frauds Act with respect to the Reeds -- Frank and Christina Reed over things that happened in the efforts to foreclosure their house in New Jersey or, in a recent opinion -- I haven't ruled on the ultimate merits, but I overruled an objection to the claim of Tia Smith in California arising under the Unfair Competition laws, Business and

Professions Codes 17200 in California.

I overruled an objection in part as to the Gilberts claim in North Carolina. One doesn't have to be a rocket scientist to see that there were instances -- maybe many, maybe not, I don't know -- where one of the debtors took inappropriate action, for wont of a better term. I mean, there are reported decisions that focus on alleged robo-signing by a guy, Jeffrey Stephan. So there's no question that various of the ResCap debtors were sloppy or worse in mortgage foreclosure.

I know that. Mr. Lewis knows that. His firm wasn't representing them at the time, but that's not what -- we're not going to have -- if that's what you're trying to -- if you think the statute, whether your claim includes it now or not, whether you think you're going to amend it or not, if the statute provides if there's a pattern, you get 1,000 dollars, you're not here fighting about 1,000 dollars. So I'm not -- there's a fixed amount available as part of the confirmed plan to satisfy borrowers' claims.

Every dollar -- every additional dollar spent in discovery or trial or pre-trial proceedings dilutes the amount that will be available to satisfy borrowers' claims. In the opinion with respect to the claim of Frank and Christina Reed, one of the reasons that I declined to award punitive damages, I also found they hadn't established the standard for it, but I

also said that punitive damages are inappropriate in a case where it's not the debtor -- it's not the defendant that's going to be punished. It's going to be people with -- who filed proof -- who have allowed claims -- borrowers with allowed claims against the debtors who are going to suffer because of dilution of the amount available for recovery.

So I'm not -- I don't mean to be lecturing you. Mr. Mack has a serious claim against the debtors. I've already written an opinion about it. If we have to try it, we're going to go ahead and try it. We're not going to try how GMAC or Homecomings or RFC or any of the other debtors, what they did with respect to anybody else's loans. We're going to try it with respect their handling of the Macks' loans.

With respect to -- let me make clear, I'm not ruling today on specific discovery requests. If I have to, I will. What I just said, though, Mr. Lewis, doesn't mean that Mr. Garber can't inquire -- we're not retrying the Deutsche Bank case, but I -- unless I'm given specifics about why, it seems to me that the whole course -- just the way Mrs. Macks' medical history, going back well in time, is relevant to -- may not be relevant evidence at the trial, but it was certainly relevant to what you want discover. I don't see any reason why Mr. Garber shouldn't be able to inquire about the entire history of handling of the Macks' loans even though he can't seek to recover for those things that are barred by res judicata that

I've already ruled on.

That's just kind of general, based on that rule and on specific discovery requests at this point.

MR. LEWIS: Your Honor, may I --

THE COURT: So I had a fairly strong reaction to the extent that if Mr. Garber's seeking to open discovery up to what ResCap did with respect to other people's loans. But that isn't to say that I won't have the same feeling about what he's trying to discover with respect to the Macks' loans here.

Go ahead.

MR. LEWIS: Your -- a couple of things quickly. First of all, I was certainly not asking the Court to rule on a discovery --

THE COURT: Yeah.

MR. LEWIS: -- fight that's not in front of the Court. It was for a different purpose that I was quoting that discovery.

The second thing is my understanding of this case is it's about the 10/26 QWR, GMAC and its apparent failure to respond to it in time and the consequences of that.

THE COURT: So look, let me just stop you. I'll let you go on, but I just -- I've learned more about RESPA in this case than I ever wanted to know.

MR. LEWIS: Me, too.

THE COURT: And I suspect there is a lot more about

RESPA I don't know now, okay? But I've learned a lot about RESPA. I don't know, Mr. Lewis. I understand RESPA allows a servicer a particular amount of time to respond. That time has been shortened, but the shortened time doesn't apply here. I don't know, for example, whether there are arguments that can be made where the qualified written requests ask for information that's so obvious and apparent and requires no research other than a minor inquiry or they already know it that liability is excused by the fact that they can sit back for sixty days before responding to it.

I don't know, okay? I haven't seen any cases that deal with that. What I do know is that well before the QWR, Mrs. Mack, on multiple occasions, contacted GMAC trying to figure out why this foreclosure action was brought. And I'm not saying the evidence -- what I've been told is or read in papers is that GMAC said, oh, it's a mistake. It'll be stopped. Okay? If it was a mistake when they told it to her on the phone, it -- when they finally, in frustration or otherwise, sent a written qualified request, it suddenly didn't become information that was too complicated that required sixty days to respond. Okay?

I don't know as a matter of law whether RESPA liability can be predicated on what happens from the time the request is made until the deadline for responding. They didn't respond, okay? So I just don't know, and I'm not -- but

there -- you would have a hard convincing -- if -- you've never disputed that GMAC told her, oh, it's a mistake, don't worry about it and this crazy lawyer, Stern, in Florida, now disbarred, wouldn't stop the case.

So I mean, there are certainly inquiries that a qualified written request could make that require time to respond accurately. And maybe there were things in this one -- I don't have the written request in front of me, but maybe there were things in here that did. But a request to find why GMAC was continuing to prosecute a foreclosure when they weren't in default is not one of those things.

So I -- but I don't know. I'm not --

MR. LEWIS: I understand that, Your Honor.

THE COURT: It's what bothered me about this case from the start.

MR. LEWIS: I understand that. And I would be content to respond to targeted discovery about issues like that. That's not what I'm facing here, and I think -- and again, that's not before the Court today.

THE COURT: Hold on a second. I would assume that you have already turned over every shred of paper to Mr. Garber that deals with the servicing of the Macks' loan.

MR. LEWIS: Yes, everything in the work room --

THE COURT: Whether it's the --

MR. LEWIS: -- that the client collected.

THE COURT: -- servicing notes or whatever else there was, whether the -- I don't know. Were there requests for electronic -- you know, for e-mails or things like that? I don't know what the requests have been. I'm not sure what it is that you have that he's asking for that you haven't provided.

MR. LEWIS: I don't think there's anything, and I'm more than happy to respond to targeted discovery that reflects even the possible scope of this case. But the possible scope of this case really is from October 26th on.

THE COURT: Well, you say that, but -- okay. That's probably true, but I'm not ruling on that now. But Mr. Lewis, for discovery purposes, it seems to me -- and you -- but you already may have done this -- is when did GMAC first have any involvement with the Macks. When did they start servicing the loan? What are the -- you've given them all the servicing notes?

MR. LEWIS: Yes.

THE COURT: From day one and --

MR. LEWIS: Yes.

THE COURT: -- not October 26th?

MR. LEWIS: I have. And as a matter of fact, he has them already from earlier litigation. But I believe it's my responsibility to give it to him again. So I did.

THE COURT: Okay.

MR. LEWIS: In fact, what Mr. Garber --

THE COURT: What is it that you -- Mr. Garber, what is it that you're asking for that -- for discovery purposes, I'm not saying any of it -- I'm not saying what, if any of it, is going to be admissible at trial. But what is that you want?

MR. GARBER: Your Honor, we have received approximately 140 pages of documents that have been Bates stamped from ResCap or GMAC. They're all documents I already had before. One of them was even one that I filed with this complaint. It's the notes -- the purged loans notes about this.

Now, it can't possibly be true that GMAC has given me all that they have on this case. And --

THE COURT: I don't know.

MR. GARBER: -- I will --

THE COURT: Go ahead, tell me.

MR. GARBER: -- show you why I believe it.

THE COURT: Okay.

MR. GARBER: So Your Honor, you don't have a copy of the purged loan notes in front of you, but I will try to go over them in a manner in which it may be clear to the Court.

These loan notes go back to the beginning of the loan, and they, of course, went through the time of the foreclosure. And I've highlighted certain portions to the Court in my defense of this claim. But they went on after that. The Macks

had a contract to sell their property, which they did when they felt they were going to be foreclosed against. They sent certain documents in support of that to -- or at least it indicates in on the purged loan notes to GMAC. I don't have those. They were not supplied to me.

Later on, in January and February of 2010, the Macks were trying to close the sale of their house and pay off the loan. And there were several back and forths, according to the purged loan notes, between the Macks, their attorney -- not me. They had an attorney --

THE COURT: Um-hum.

MR. GARBER: -- for the closing -- and GMAC. And if I can refer to them specifically --

MR. LEWIS: Your Honor, I have an extra copy.

MR. GARBER: -- on the -- I only have this one. But if you turn to 1/14/2010 -- it's difficult to read these things because they're kind of disjointed, but I will read what I have here. This is a purged loan note, and it was written on behalf of Agent 12883 for GMAC.

And it says, "Mailed letter advising there is a balance of liquidation/preservation fees on your account in the amount of 3,712 dollars." That was the money that GMAC paid for this foreclosure. That was their service, their fees to their attorney and so forth, and they were demanding that they be paid that money before they would release their mortgage so

that it could be sent. And they say down here they sent a letter saying that. I don't have that letter. I never got it.

There's another reference on the 15th where my clients sent the listing agreement on the sale of their property, which GMAC insisted they have in order to release the mortgage. And I don't have a copy of that. They didn't give me a copy of that.

Later on -- I won't go over single letter, but it suggests there are probably are three or four letters back and forth that were never given to me. Later on that year, primarily in September and October, the Macks came to the conclusion that they -- I won't get into that now because we're not here to try the case. But they came to the conclusion that they could not stay in Naples. They had to move back to South Jersey, and they bought the house of Mrs. Mack's sister. And they applied for a loan, but they ran into a problem because their credit was shot because they had a foreclosure.

So Mrs. Mack started writing in October of 2014 demanding that their credit be repaired.

THE COURT: Not 2014.

MR. GARBER: I'm sorry, you're correct, 2010, demanding that their credit be repaired. And there are numerous entries here of telephone calls and letters and so forth. We have never had -- I've been given a copy of any of those letters explaining why their credit cannot be repaired,

why it has to be damaged. And I want that.

That is in addition to -- and I've asked separately -- that we be given copies of all documents that GMAC would have -- although the Macks did not borrow money from GMAC on this New Jersey house, GMAC bought the loan. And they wound up owning the loan on the --

THE COURT: On the New Jersey house?

MR. GARBER: On the New Jersey house. And so I've asked for a copy of the entire file from the New Jersey house, too. And that has been objected to. GMAC refuses to give it to me. They say that has nothing to do with a mortgage down in Florida, but I think it does because they're still fighting this battle over credit scores.

They -- I don't know if they paid more money on their loan, probably did, higher interest rate because they could not get this resolved with GMAC. So is it relevant to our claim? I don't know, but I think I should be able to look into it and consider if that could be brought. We do want that.

We have filed a request for a production of materials that would support a punitive damage request, and I understand very clearly the Court's ruling now that that would not be relevant and not be permitted by the Court. And so I'm not here to present --

THE COURT: You're -- let me just -- I don't want to be too hasty in -- do you think the statute permits you to

recover more than the 1,000 -- that additional 1,000 dollars?

MR. GARBER: Your Honor, I have not found a single case that would suggest that.

THE COURT: Okay.

MR. GARBER: As a matter of fact, to the contrary, I have found numerous cases that suggest to the contrary. Are those courts are all right? Could it be possible? I don't know, but it would be a very difficult argument.

THE COURT: Okay. Because, look, I have shown no hesitancy even with a debtor in a Trust to give what statutes provide. So for the Reeds, it was New Jersey Consumer Fraud Act, treble damage statute. I found the damage; I trebled it. Okay? The California Unfair Competition Law, treble damage statute, that's what the statute provides. We'll see whether the claimant recovers under it. So far, the objection was overruled to it. But -- so if RESPA -- if the statute says if you show X, Y and Z, you get an extra 1,000 dollars, if you show X, Y and Z -- if Mr. Lewis put you to the test of -- the -- I can't imagine the Trust spending an hour of a lawyer's time trying to establish you're not entitled to 1,000 dollars, okay? That's what -- you're not here fighting about 1,000 dollars, okay?

Go ahead, Mr. Garber.

MR. GARBER: Okay. So we feel that we have other documents -- now, I don't think Mr. Lewis has this. This is

not Mr. Lewis' fault.

THE COURT: Look, if Mr. Lewis had the documents I have absolutely no doubt he would just give you the documents.

MR. GARBER: I think he would, too. I think that GMAC either has the documents or they have destroyed the documents.

THE COURT: Well, there are other alternatives -- there are other things that may have happened along the way, too. They may never have kept them in the ordinary course.

If you read the flow of decisions which you probably don't want to waste your time doing but it seems like every week I have another written decision in another borrower claim or another -- so even something during the case, they have to send to object to -- before they can object to a claim, they have to send a request letter. Well, on some of them they have the forms of the letters but not the letters themselves they sent to specific people.

Mr. Lewis, I am sure, understands that the Trust must produce documents in -- when I say "its", it includes from the debtors, right -- their possession, custody or control. They can't produce what they can't find, what they don't have. If and when the time comes and you have arguments about what the consequences should be of failure to produce the documents, well, I'll listen to it. I can't --

At one point in this case, Mr. Lewis -- and that's focused on the borrower -- not, Mr. Lewis, I'm sorry, Mr.

Garber -- for both of you, I think Mr. Lewis probably knows this, in connection with the examiner report, nine million pages of documents were produced. There have been other countless productions of documents in this case. There are electronic copies of a lot -- a lot of stuff was scanned.

So, Mr. Lewis, Mr. Garber has pointed to servicing notes, he refers to as the purged loan notes that reference --

MR. LEWIS: Yeah, let me explain first the term "purged".

THE COURT: Go ahead.

MR. LEWIS: It's nothing ominous.

THE COURT: I'm not -- I don't think it --

MR. LEWIS: Just so you know --

THE COURT: Okay.

MR. LEWIS: -- what happens is when the loan notes get to a certain age, they are retired to another computer system --

THE COURT: Okay.

MR. LEWIS: -- and purged from the main computer. That's why it's called purged loan notes. I was struck by the number of documents that the client gave me access to on this online workroom and so I questioned them about it. And I was told in part what you have just said. A lot of the documents, they don't actually keep the originals. They generate them from a database, but they don't keep a copy of what's

generated. It's gone. And the only way to produce it would be to go back and regenerate it from the database with the same parameters. That's why there aren't as many documents as you might expect. That's what I understand.

On the New Jersey house, this is very strange, I have to say, when I got this document request about the New Jersey mortgage, I asked Mr. Garber in an e-mail, I think it was, or maybe a letter, what's this about? It's not Florida. And I got a letter back from him saying, "Oh, yeah, it's a different -- it's not relevant. Don't worry about it." I didn't bring that letter with me because there was no reason for me to. I'm stunned, frankly.

THE COURT: I don't know, his explanation of why he wants it sounds plausible. I'm not ruling on the request but -- and I'm sure -- I don't know whether the two of you have had a discussion focusing on that letter, so if -- GMAC commenced an improper foreclosure action against the Macks because the Macks were current when the foreclosure action was filed. Mr. Stern wouldn't dismiss the case. He defaulted on the cross-complaint against Deutsche Bank. He's disbarred.

The Macks, I gather from the litigation against Deutsche Bank, sold the house, lost money in the sale, recovered as part of their damages against Deutsche Bank, the diminution in value to the property by reason of the wrongful foreclosure. I don't know if that's exactly what -- that's the

gist of what I took away from part of their recovery. Okay?

If what Mr. Garber is saying is that to try and get back on their feet, the Macks bought from one of their relatives, a house in New Jersey, moved out of the house in Florida, moved to New Jersey because of the wrongful foreclosure, their credit was impaired, if his argument is if GMAC had timely responded to the QWR, and acknowledged wrongful -- essentially that the foreclosure action was commenced in error, that the Macks were current on their loan, credit reporting agencies might well have treated the Macks differently. Their credit may have been -- their credit scores may have been different. The reluctance of other banks to lend may have been different.

So I don't -- I'm not saying it is part of recoverable damages on the RESPA claim. I'm not saying it's not. At least -- from the way at least Mr. Garber described it today, at least -- unless and until I get a precise discovery dispute over it, it seemed plausible to me that he was requesting that information. It may not be how he described it to you before. It may not be the way it should be described today. But at least as the way he described it to me a few minutes ago, I can't say -- I don't react to that the same way I did to his trying to find out about any other loans that GMACM -- to totally unrelated borrowers. It's linked to the Macks, okay?

And I could see plausibly how he could argue it's

linked to their failure to respond to the QWR because it resulted in continued adverse effects to their credit rating. It cost them money in terms of higher interest rate on a loan or ability to get a loan. How did GMAC wind up owning the loan on their new house? Do you know?

MR. LEWIS: No. But, Your Honor, here's the thing about that.

THE COURT: Do they still own that loan?

MR. LEWIS: I believe they do.

THE COURT: They didn't sell -- this didn't go to Berkshire Hathaway?

MR. LEWIS: I don't know. Oh, did GMAC sell the loan? Oh, I imagine they did.

THE COURT: Okay.

MR. LEWIS: I don't know.

THE COURT: All right. Do you think they still own the loan, Mr. Garber?

MR. GARBER: Your Honor, I haven't been told to the contrary, so I don't believe they do.

THE COURT: You know, they -- I wouldn't expect you to know in the bankruptcy case. I mean, they still do own some loans, not a whole lot. They sold most of their loan portfolio to Berkshire Hathaway during an auction in the bankruptcy. I have no idea whether this was one of them or not. And they have sold it separately to somebody else before or after. I

have no idea. This is the first I'm hearing that.

MR. LEWIS: Well, I was kind of stunned by it. We did actually --

THE COURT: GMACM's relationship with the Macks extended beyond the house in Florida.

MR. LEWIS: We actually did find the note and the trust deed. I was stunned. I contacted the client. They were kind of puzzled.

THE COURT: Could you find out if they still own it?

MR. LEWIS: I didn't ask that question.

THE COURT: No, could you find out?

MR. LEWIS: Oh, sure. So let me --

THE COURT: It wouldn't be unheard -- does he still live in that house in New Jersey?

MR. GARBER: Yes, Your Honor. Mr. Mack still lives there.

MR. LEWIS: So, Your Honor --

THE COURT: It wouldn't be the first time that something like that figured into settlement discussions, Mr. Lewis.

MR. LEWIS: The thing about the credit score, when the Macks got a judgment in May of 2011 at the prove-up hearing on the default judgment, that judgment included damages not only for the loss value of the house but for emotional distress and for credit damage. That's after they moved to New Jersey.

They've already recovered for it.

THE COURT: We'll see. Okay. You may absolutely be right but if we're -- you ought to meet and confer with Mr. Garber, and if he what he wants are documents that relate to the New Jersey property that they bought while they were selling as part of the continuation of this -- they had to move somewhere. They moved from Florida. They moved to New Jersey. I think you ought to meet and -- I'm not ruling on it now.

MR. LEWIS: Your Honor?

THE COURT: It may be that there's something that I don't understand, so I am not --

MR. LEWIS: I'm not one to stand on a lot of technicalities, particularly when there's not a lot of burden involved. If Mr. Garber has now changed his mind from what he told me in his letter that he now wants it, I'll give it to him.

THE COURT: You'll two talk about it, okay?

MR. LEWIS: I'll give it to him.

THE COURT: Okay.

MR. LEWIS: It's as simple as that.

THE COURT: Let me ask a couple of questions. When we had the last telephone hearing, much of the discussion was about medical records and the cost of obtaining medical records. During the telephone hearing, you quite reasonably narrowed the time frame for which you were seeking records.

But that left it with the two of you sort of going back and sort of dealing with some of the providers. Do you now have the medical records you need other than -- I know you may want to take a doctor's deposition. You said you read some notes that are hard to read. Tell me what the situation is with the medical records.

MR. LEWIS: The only medical records that I now need, whatever may be left, are the medical records of Mrs. Mack's emergency treatment and follow-up for her overdose. I don't have those yet.

THE COURT: That's a Florida hospital?

MR. LEWIS: Yes, and I need them.

THE COURT: Okay. And what was the status of -- and I think when we had the hearing on the telephone, I suggested that things that were -- records that were sort of geographically in Mr. Garber's area, he ought to take the lead in trying to obtain them. If they were elsewhere, it may make more sense for you to go ahead. What's the status of those records with respect to her treatment for the overdose?

MR. GARBER: Your Honor, with respect to her treatment for the overdose, there are two types of records; number one, there's the hospital records.

THE COURT: Right.

MR. GARBER: And we have those hospital records and we've give (sic) them to him --

THE COURT: Okay.
MR. GARBER: -- given them to Mr. Lewis.
THE COURT: Uh-hum.
MR. GARBER: And they will be the bulk of it. They'll be ninety percent of it. But in addition to that, there were treating physicians that may have come to see her and they may have some office notes.
THE COURT: Okay.
MR. GARBER: We have been able to identify two physicians that might have such notes. Number one is her psychiatrist, a guy named Dr. Lichi. He moved. He's now in northern Florida.
THE COURT: That's who we've heard -- I've heard about him.
MR. GARBER: Yes.
THE COURT: Where did he move to?
MR. GARBER: Northern Florida, near Tallahassee.
THE COURT: Okay.
MR. GARBER: And he's been giving us trouble but he did give us five pages of medical records. The other one is her primary care doctor, a Dr. Foley in Naples. We don't even know where she is. We have an old address on her. The mail is coming back. We want not only her medical records that would show some of the history but also the stay in the hospital --
THE COURT: Um-hum.

MR. GARBER: -- and after that. We want not only those records; we want to take a deposition.

THE COURT: The Florida Medical Board, has somebody checked with them to see whether they have a current address? Is she still licensed in Florida?

MR. GARBER: She's still licensed in Florida and they have an old address on her and the mail's coming back from that. So I think we're going to be able to find it but we've run up against a stone wall.

The other source of records, the big source of records that I think we have here is in northern Florida at the Mayo Clinic --

THE COURT: Yes, we had a discussion about the Mayo Clinic last time.

MR. GARBER: -- we have had trouble with them. They lost our request. We sent them another request. We've been on their back, and they now say that they don't have to send us all of the paperwork which would be many, many, many thousands of pages, that they can put them on CDs. And they've given us an estimate, I think, of 1,500 dollars. So I told my associate to please go ahead and order those things.

THE COURT: Okay.

MR. GARBER: Get them in and you left open who should pay for that --

THE COURT: Right.

MR. GARBER: -- but we need them in.
THE COURT: Okay.
MR. GARBER: And we have one final thing that I think is needed for our case, even whether they think they need it for theirs. There was a treating doctor in New Jersey, a Dr. Dorfner, who was the primary care doctor during various hospitalizations, various injuries.
THE COURT: Did she pass away in New Jersey?
MR. GARBER: She passed away in New Jersey in the fall of 2013. So Dr. Dorfner, as far as we can tell, is going to have the most information about her care in New Jersey while she was out there for a year-and-a-half or two years. And we need to take his deposition. So --
THE COURT: Did you get his records yet?
MR. GARBER: No, we don't have his records. Well, I take that back. We have some records from him because they were supplied through the hospital.
THE COURT: Okay.
MR. GARBER: But we don't have his records from his office. But we have them from the New Jersey Hospital and we supplied those.
THE COURT: Has someone communicated with him through this -- have you served a subpoena -- anybody served a subpoena on him for his office records?
MR. GARBER: No, we have not served any subpoenas.

We've narrowed it down to these three individuals and it looks like at least on Dr. Lichi, we'll have to serve the subpoena. He is not going to cooperate with us. So --

MR. LEWIS: Which is disturbing.

THE COURT: Well, just pull the microphone a little closer, Mr. Lewis.

MR. LEWIS: Yeah. Because under both New Jersey law and Florida law -- I researched this -- they are required to provide those records if requested. They charge a reasonable fee for it, but it's not optional with them. And I am not suggesting that --

THE COURT: Tell me this, Mr. --

MR. LEWIS: -- Mr. Garber isn't doing his part on that.

THE COURT: Tell me this, is this the first person you've ever served a subpoena on who has given you a hard time?

MR. LEWIS: Well, I haven't even served a subpoena on him.

THE COURT: Okay.

MR. LEWIS: Yeah.

THE COURT: Is it -- I --

MR. LEWIS: No. But I grew up in a medical family and I find it disturbing.

THE COURT: Okay.

MR. GARBER: Your Honor, I deal with this all the

time. It's not surprising to me. And he has given us the records, but I can't read those records and I do think it's necessary to talk to him --

THE COURT: Okay.

MR. GARBER: -- and find out what he knows.

There is one other item that I have that I wanted to bring up with the Court. I think this is just form over procedure but I want to make sure that I've touched on it. The Court knows that Cheryl Mack died in the fall of 2013. Barry Mack, her husband, is her executor and he's also the beneficiary of her estate. Does the Court need that we add the Estate of Cheryl Mack as a party or can we go forward on this?

THE COURT: What's your position, Mr. Lewis?

MR. LEWIS: I don't care, Your Honor. I told Mr. Garber that this morning.

THE COURT: Here's what I -- you're getting outside of my area of expertise, okay? I think I had this come up once maybe but I think what might be the most expeditious way to work on something -- to solve an issue that neither of you seem to making an issue is to enter into a written stipulation that just makes it clear that he can proceed without substituting the estate. See if you can work it out, okay?

MR. GARBER: Yes, Your Honor.

MR. LEWIS: I'm sure we can.

THE COURT: It's fine with me. If you can't agree --

MR. LEWIS: We won't have any trouble agreeing, Your Honor.

THE COURT: Okay. I think I had one other case where somebody did have to substitute the estate but the parties couldn't agree on anything. I think this should be the least of the problems, okay?

MR. GARBER: Okay. Your Honor, I had four items. All the four items have been covered.

THE COURT: Okay.

MR. GARBER: And I think I understand --

THE COURT: So give me some -- what I want to know about is timing.

MR. LEWIS: Your Honor, I think we will finish discovery in the four months, assuming things continue to percolate along as they are now.

THE COURT: Just a little closer to the microphone.

MR. LEWIS: Sure. I'm sorry, Your Honor. I should have gotten the message the first time.

THE COURT: No, it's okay.

MR. LEWIS: I think I will finish fact discovery in the four months originally set aside if things continue to percolate along as they have been. I don't see taking a lot of depositions. I see a few and they are going to be in different places and probably towards the end of the process.

I think Mr. Garber's nearly done producing documents

to me and there's going to come a point where I am going to tell him don't bother with anymore anyhow because I don't need to know everything. I just need to have enough information that's collaborated (sic) in some way that -- corroborated in some way that I can be comfortable with what I have, and I'm very close to that. And the last batch of stuff that Mr. Garber has talked about this morning that he hopes to have to me, ought to cap that off. So that's where I see it and that would put us in the expert discovery period which the Court set aside two months for.

There may be other issues that come up along the way. I'm expecting, frankly, that we will have some disagreements over discovery but we will deal with those if and when they happen and we can't get them resolved amongst ourselves.

THE COURT: Okay. Let me raise a couple of other general subjects without -- I'm just -- look, I'm still hoping that you can come to an agreement to settle the matter; you will or you won't. It strikes me if you can't settle the matter by agreeing on a number for an allowed claim, it raises some issues about how you want to proceed in this court to try the issues. It does strike me that the trial could be time consuming and, therefore -- with a lot of witnesses and expensive for both of you.

So I have encouraged parties on occasion to try and agree on a streamlined, expedited means for trying a case.

Section 502(c) of the Bankruptcy Code provides for estimation of claims, and in one hotly contested matter, the parties had been litigating for six years in state court before the bankruptcy started. And if a full-blown trial had been necessary, yeah, I said, fine, I'll do it but I suggested, why don't you see if you can agree to a more summary trial.

So I don't know whether you practice bankruptcy law or not, Mr. Garber; the 502(c) estimating claims -- you can go read Collier, the Bankruptcy treatise -- a bankruptcy judge has very broad discretion in establishing the procedures for an estimation hearing -- estimation trial.

And so what I got the parties to do was they consensually agreed. They tried the case. Each side would call no more than two witnesses. I agreed in advance and they agreed that the hearsay rules would not apply and that I would give such weight to hearsay evidence as I deemed appropriate so that, like, if people were talking about meetings, they were talking about what other people said and I listened to it all. It turned out there weren't any real great disputes, but if someone had been a stickler about hearsay rules, it would have taken around another two days of trial to get the same evidence in.

They didn't need any experts. But I tried the case, I'm trying to think whether it was a day or two and I wrote an opinion and solved it and I've got to tell the lawyers told me

afterwards they said, we could have litigated this for another three years and we would have gotten to the same place that we did at the end.

When I was a lawyer, in one particularly contentious matter, a complicated, contentious matter, the parties agreed to a summary trial before a magistrate judge in New Jersey. We did it. We agreed on the ground rules for it. Each side put on a few witnesses. We had lengthy argument. We basically -- we did away with the hearsay rule and it got the matter -- I honestly don't remember there how we wound up concluding whether it was going to be binding what the magistrate judge did or not, but he listened to a couple of days of evidence and argument and he basically told us what he thought and we agreed and we settled it on that basis.

So all I'm suggesting is look, if you can't do that, fine. I'll try whatever is necessary. I'll apply the rules of evidence. If you try to introduce stuff that I don't think should come in, I'll rule on it, keep it out and the same goes the other way. But I don't know that you're going to achieve a result substantially different from if you do a full-blown trial, if you try and agree on something more summary. I'm just throwing some things out.

If you don't want to do it before me, agree on ADR where you do it before somebody else that you agree on. I don't know. I just -- I'm always concerned about how much time

it takes me to hear a trial of a matter. When I do trials, I do them day-to-day. I mean and some -- you know, a lot of bankruptcy judges windup not doing that because we have bench trials and I never liked as a lawyer in an arbitration when it got extended out over two months with a day here and there, I hated it. And so every trial I've done as a judge, I do them day-to-day. I work with my calendar and move it around. I may hear some emergency matters in an afternoon but I try things day-to-day and we get it done and everybody -- I want it fresh in my mind and I want the lawyers to be able to concentrate and focus, put their evidence on and arguments. But I'm still hoping that once each of you have all the information you need to evaluate settlement, with or without a mediator -- you're both experienced lawyers. You don't always need a mediator to help you in that circumstance. You'll find a way to solve this problem.

Anything else either of you want to raise today?

MR. GARBER: Your Honor, to briefly give the Court an idea of where we're coming from, there's a Roman saying that's something to, "Si Vo (sic) Vis Pacem, Para Bellum," which means "If you want peace, prepare for war." And so I have been focused on, if we do go to a trial, what would it be because that's the best means to see that this thing can settle in my opinion.

And if we go to trial, the plaintiff would probably

have four live witnesses that I could pare down to two, and we would have five depositions. And I have seen courts, they don't need to have it read to them in court, they go --

THE COURT: I don't have depositions -- so that you're both aware right now, I read the depositions in chambers. We don't take trial time. I have sat through responsive reading of depositions; it's awful. So I read the depositions. I require -- nobody dumps whole depositions in. You do designations, counterdesignations, objections I rule on in advance. Once it's settled what's going to be in evidence, I don't read it from the bench, I read it beforehand.

MR. GARBER: Okay. So our two witnesses, my guess is, they would be no more than three hours with cross-examination. We would have approximately one hundred pieces of paper which I think we'd go through fairly rapidly. Now it may be and I often find the defense wants to have thousands of pieces of paper because that's just the way defenses go. I don't anticipate the defense would have many witnesses.

So from that point of view, I don't think we'd have a trial more than two days and I've certainly seen issues like this go in one day before a judge.

THE COURT: Okay. Maybe my fears were unfounded.

Mr. Lewis, do you want --

MR. LEWIS: Well, Your Honor, I think Mr. Garber's assessment of this case is probably pretty accurate.

THE COURT: Okay.

MR. LEWIS: I might not have any of my own GMAC witnesses. I might have -- want to talk to Mr. Garber's witnesses. I might want to call a witness from his camp, so-to-speak, when I know more, but it's not go to be a major -- it's mostly documentary and I think Mr. Garber and I are going to be able to work out -- for example, the medical records, they're just business records that speak for themselves. They say what they say.

THE COURT: If somebody can read them.

MR. LEWIS: Yeah, well, those are -- I'm talking about the typed ones. I can read some of Dr. Lichi's handwriting but some of it, I can't. And so I also don't envision a major proceeding over this subject.

THE COURT: Mr. Garber, and I don't know whether you've thought about it at all, the Trust has the misfortune of not having anybody around who knows anything about anything contemporaneous to the events and so there can be issues about authenticating business records.

In the hearings I've had, the trial I had, we didn't have any issues about it. They just -- the stuff came in but I think you need to -- when the two of you, if you're headed to trial, you need to get serious about figuring out what exhibits are going to come in by stipulation and that sort of thing.

MR. LEWIS: Yes. And I don't think many of our

business records are going to be of consequence. I mean the basic things are the 10/26 letter and the lack of any entry in our purged notes of the response. It doesn't mean one wasn't sent but I can't prove to you that one was. That's a piece of Mr. --

THE COURT: Did the receipt of the letter get logged in in the servicing notes?

MR. LEWIS: I'm sorry?

THE COURT: Did the receipt of the QWR get logged in?

MR. LEWIS: No, there's no record of it and there's no record of a response and that's in the purged loan notes and that's the only record basically that I have. And we also have other documents that have been collected but none of them is that letter or a response to it. And the only other documents would be, for example, the dismissals and some of that might be important but those documents, I don't think anybody's going to contest or the timing of them.

So it should be, in that sense, a fairly simple case especially, you know what, Mr. Garber's an experienced lawyer, I'm an experienced lawyer. Neither of us, I think, spends a lot of time going around in circles and I'm sure we'll be able to get a lot of stuff arranged.

THE COURT: Has anybody been deposed so far?

MR. LEWIS: Not yet. It's sort of been pending receipt of the fundamental documents.

THE COURT: Are you going to do the depositions as video depositions? Have you talked about that?

MR. LEWIS: I haven't really. I don't, I mean the depositions I envision, I don't know that I need to have them as video depositions, but I haven't made a decision yet. Do you prefer video depositions?

THE COURT: I'm not pressing one way or the other.

MR. LEWIS: Okay. Well, if you did, I would be happy to do it if that's easier for you.

THE COURT: It's not easier.

MR. LEWIS: It's the Trust's money after all.

THE COURT: I know. It's not easier.

MR. LEWIS: Okay.

MR. GARBER: Your Honor, the three doctors that we've identified to the Court, Dorfner, Foley and Lichi, we would anticipate by videotape. We do have the videotaped deposition of Cheryl Mack while she was alive and we have the videotaped deposition of Barry Mack but I wouldn't present that deposition if he's available.

THE COURT: Is there going to be any issue, Mr. Lewis, whether Mrs. Mack's deposition is admissible? She's obviously unavailable, that's for sure.

MR. LEWIS: No, I don't think there's going to be any -- I've read the transcript. I know what's in it.

THE COURT: Okay. So you think you're going to

complete fact discovery when? I can go back and look. What are the deadlines?

MR. LEWIS: Four months from August 27th when the Court issued the scheduling order is fact discovery. Two months longer is expert discovery, if anybody's going to have an expert. I'm not sure I am, and I am not sure whether Mr. Garber is going to have an expert. I mean, there's a lot of doctors but they're not necessarily going to appearing as experts. They're going to be appearing --

THE COURT: So what's the date for cutoff of fact discovery in December?

MR. LEWIS: It would be December 26th or thereabouts.

THE COURT: Get a date from Deanna for a telephone status conference, not that I don't want to see you, I'm happy to see you, for early January.

MR. LEWIS: Okay. I'll do that, Your Honor.

THE COURT: And let's see where we are --

MR. LEWIS: Okay.

THE COURT: -- at that point. Okay?

MR. LEWIS: Thank you very much for your time today.

THE COURT: The two of you are welcome to sit here and talk and maybe even settle the case but --

MR. LEWIS: I would be happy to talk with him. I think we need to get a little bit further before we could settle but we'll find out.

THE COURT: Okay. All right. Thanks very much.

MR. LEWIS: Thank you, Your Honor.

THE COURT: Nice to see you both.

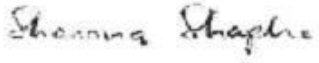
MR. GARBER: Thank you, Your Honor.

THE COURT: It's a nice day in New York.

(Whereupon these proceedings were concluded at 3:12 PM)

**C E R T I F I C A T I O N**

**I, Sharona Shapiro, certify that the foregoing transcript is a true and accurate record of the proceedings.**



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